

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DON C. ODEN)	
Claimant)	
VS.)	
)	Docket No. 1,035,894
CARITHERS LIQUOR)	
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the December 31, 2008, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on April 17, 2009, in Wichita, Kansas.

APPEARANCES

James S. Oswalt of Hutchinson, Kansas, appeared for claimant. Douglas D. Johnson of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, on October 2, 2008, the parties filed a written stipulation with the Division of Workers Compensation in which the parties agreed claimant's employment with Sirloin Stockade began on May 3, 2008.

ISSUES

On January 20, 2007, claimant fell while working for respondent. In the December 31, 2008, Award, the Judge awarded claimant permanent partial disability benefits under the schedule of K.S.A. 44-510d for a 13 percent impairment to the left leg.

Claimant argues he also has a left hip and low back injury due to his accident. He contends he is entitled to receive permanent partial disability benefits under K.S.A. 44-510e for a 52 percent task loss and a 100 percent wage loss, which yield a 76 percent permanent partial general disability. Claimant acknowledges his work disability¹ would end on May 3, 2008, when he began working for another employer and commenced earning more than what he was earning on his date of accident.

Respondent contends the Award should be affirmed.

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board finds the Award should be affirmed.

The parties agree that claimant fell while working on January 20, 2007, while clearing snow and straightening a concrete parking block in front of respondent's store. Claimant fell backwards and landed on his left foot and leg, which was planted against the concrete block. His right foot ended up in the air. Approximately an hour after his fall, claimant was taken to a local hospital's emergency room.

The parties agree claimant's accident arose out of and in the course of his employment with respondent.

Claimant eventually came under treatment by Dr. Scott G. Goin, an orthopedic surgeon who first saw claimant on February 9, 2007, and later that day operated on his left knee for a torn quadriceps tendon. Following surgery, claimant underwent physical therapy. Dr. Goin eventually released claimant with no restrictions.

Respondent does not dispute that claimant sustained permanent injury to his left leg as a result of the January 2007 accident. But respondent denies that claimant also injured his left hip or back. Claimant testified he developed a constant dull ache in his left hip and ankle as well as intermittent lower back pain after he was able to get around more without his crutches and without his brace.² Claimant maintains he remembers three occasions during which he told Dr. Goin about the symptoms in his hip but the doctor never really

¹ A permanent partial general disability under K.S.A. 44-510e that is greater than the functional impairment rating.

² R.H. Trans. at 21, 22.

examined it. According to claimant the doctor told him the hip symptoms would probably take care of themselves.

When Dr. Goin released him in June 2007, claimant tried to return to work for respondent but he was told there were no positions available. Claimant testified he then began making telephone calls to potential employers, checking the newspaper for jobs, and that he registered with a placement agency. He also applied for and received unemployment benefits. Despite submitting many job applications, claimant received no job offers until Sirloin Stockade offered him a job as a cook. The parties agreed claimant commenced working for that employer on May 3, 2008.

According to claimant, his left knee pain has increased since he began working for Sirloin Stockade. Claimant has tried several times to make an appointment to see Dr. Goin for his ongoing knee pain but the doctor's office has advised it will contact him when it is able to work him in. Claimant testified at the August 2008 regular hearing that his last attempt to make an appointment with Dr. Goin was the week before.

Claimant's attorney hired Dr. George G. Fluter, who examined claimant on December 6, 2007. The doctor is board-certified in physical medicine and rehabilitation. Claimant rated the pain in his left hip and low back at one on a scale of zero (no pain) to 10 (the worst pain). Dr. Fluter diagnosed status post left quadriceps tendon repair, left hip pain probably caused by trochanteric bursitis, and myofascial pain in the left low back and buttock. The doctor testified regarding his diagnosis or assessment as follows:

Status post work-related injury to the left knee, 1-20-07. Status post left quadriceps tendon rupture. Status post left quadriceps tendon repair, 2-9-07. Left hip pain. Probable left trochanteric bursitis. Low back pain. Myofascial pain affecting the left lower back and buttock.³

Using the AMA *Guides*,⁴ Dr. Fluter rated claimant as having a six percent impairment to the left lower extremity (two percent to the whole person) for mild thigh atrophy; 20 percent impairment to the left lower extremity (eight percent whole person) for moderate deficit in the left knee range of motion; and five percent whole person impairment (DRE Lumbosacral Spine Impairment Category II) for the lumbosacral spine and left hip.

³ Fluter Depo. at 15.

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Combining those impairments, the doctor opined that claimant sustained a 15 percent whole person impairment for the injuries he sustained at work in January 2007.⁵

Dr. Flutter also believed claimant should observe certain work restrictions; namely, that squatting, kneeling, crawling, climbing, bending, stooping, and twisting be limited to an occasional basis. In addition, the doctor felt claimant should limit his lifting, carrying, pushing, and pulling to 50 pounds occasionally and 20 pounds frequently.⁶ No restrictions were placed on standing or walking. In short, the doctor's restrictions permitted claimant to perform labor in the medium level of physical demand.

The doctor reviewed the list of work tasks that claimant performed in the 15-year period before his January 2007 accident prepared by claimant's labor market expert Jerry D. Hardin. Dr. Flutter opined that claimant had lost the ability to perform 14 of the 27 nonduplicative tasks, or 52 percent.⁷

On cross-examination, Dr. Flutter acknowledged claimant's reported pain complaints were "pretty mild"⁸ and the only positive finding he elicited regarding the left hip and the lumbar spine was the subjective complaint of pain with palpation.⁹

Respondent presented the testimonies of Dr. Goin, claimant's surgeon, and Dr. Paul S. Stein, respondent's medical expert. Dr. Goin is a board-certified orthopedic surgeon with fellowship training in sports medicine. As indicated above, Dr. Goin operated on claimant's left knee on February 9, 2007. The doctor saw claimant in follow-up in February, March, April, June, July, August, October, and November 2007. Using the *AMA Guides*, Dr. Goin determined claimant had an eight percent impairment to his left lower extremity. The doctor testified, in part:

The rating I arrived at was 4 percent whole person, 8 percent lower extremity rating. The way I -- there's no number in the book for quadriceps tendon tear or repair, so I extrapolated data from a non displaced patella fracture, which is the closest thing I could find to a[n] extensor mechanism injury, and applied that to --

⁵ Flutter Depo. at 17.

⁶ *Id.* at 18.

⁷ *Id.* at 22.

⁸ *Id.* at 31.

⁹ *Id.* at 31, 32.

which is [what] would be a similar recovery from this type of surgery and I applied that to his quadriceps tendon tear and repair.¹⁰

Unlike Dr. Flutter, Dr. Goin found claimant had full range of motion in his left knee. Moreover, Dr. Goin testified that he does not recall claimant complaining of anything other than his left knee or leg, and that his notes do not indicate that claimant made any other complaints.¹¹ Although Dr. Goin advised claimant he could return as needed, the doctor has not seen claimant since November 30, 2007.

Dr. Stein, who is a board-certified neurological surgeon, examined claimant in early May 2008. Claimant told Dr. Stein that he really did not have a lot of pain in his knee, but he had weakness and the knee would give way. In addition, claimant reported some occasional pain on the lateral aspect of both hips. What is more, claimant indicated there was no other area of pain that he related to his January 2007 injury.¹² There was no limp or altered gait. Dr. Stein's examination revealed no tenderness, spasm, guarding, list, or neurological deficit in the lumbar spine.¹³ Using the *AMA Guides*, the doctor found claimant sustained a 13 percent impairment to the left lower extremity, which was based upon atrophy in the quadriceps muscle.¹⁴

Although claimant had some complaints regarding his hip, Dr. Stein said they were not severe and probably represented mild trochanteric bursitis. But the doctor testified that trochanteric bursitis did not comprise an impairment under the *Guides* until it was bad enough to cause an abnormal gait.¹⁵

The Board affirms the Judge's finding that claimant sustained a 13 percent impairment to his left lower extremity due to his January 2007 accident. The Board is persuaded by Dr. Stein's opinions. And, according to Dr. Stein, when he examined claimant in May 2008 there were no complaints of back pain and only minimal hip complaints.

¹⁰ Goin Depo. at 13.

¹¹ *Id.* at 14.

¹² Stein Depo. at 7.

¹³ *Id.* at 9.

¹⁴ *Id.* at 9, 10.

¹⁵ *Id.* at 10.

In summary, claimant is entitled to receive permanent disability benefits under K.S.A. 44-510d for a 13 percent impairment to his left lower extremity. The Award should be affirmed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁶ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the December 31, 2008, Award entered by Administrative Law Judge Bruce E. Moore.

IT IS SO ORDERED.

Dated this ____ day of June, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

¹⁶ K.S.A. 2008 Supp. 44-555c(k).